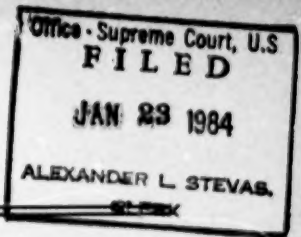


No. 83-953



In The
Supreme Court of the United States
October Term, 1983

RICHARD ROCK,

Petitioner,

vs.

ESTHER ANTONIO,

Respondent.

**RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW MEXICO**

LEO C. KELLY

300 San Mateo NE, Suite 620
Albuquerque, New Mexico 87108
(505) 262-1905

Attorney for Respondent

TABLE OF CONTENTS

	Pages
This Table of Contents	i
Grounds of Court's Jurisdiction	1
Statement of the Case	2
Summary of Argument	3
Argument and Authorities	3
Conclusion	5

TABLE OF STATUTES

28 U.S.C. §1257	1, 3, 4
Rule 35, New Mexico Rules of Civil Procedure	2
Rule 37, New Mexico Rules of Civil Procedure	2

In The
Supreme Court of the United States
October Term, 1983

RICHARD ROCK,

Petitioner,

vs.

ESTHER ANTONIO,

Respondent.

**RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW MEXICO**

GROUND'S OF COURT'S JURISDICTION

This Court has no jurisdiction. The Petitioner alleges jurisdiction under 28 U.S.C. § 1257, but Respondent disagrees and will direct her argument to that dispositive issue.

STATEMENT OF THE CASE

Respondent adopts by reference the Petitioner's Statement of the Case and offers the following additional matter which she deems necessary for clarification of the issues. All appendix references are to Petitioner's appendix to Petition for Writ of Certiorari.

In a discovery proceeding heard before the District Court for the Second Judicial District for the State of New Mexico (hereinafter the District Court), the Plaintiff sought and obtained several orders directing the Defendant to appear for the taking of blood for use in HLA and red blood cell typing. The Defendant failed to appear on several occasions and the Plaintiff sought sanctions and default pursuant to New Mexico Rule of Civil Procedure Number 37. As a result of a hearing on that motion, the District Court entered an order directing the Defendant to either appear or suffer the extreme sanctions set forth in detail in the order appearing at App. 2. The Defendant did appear, but appealed the Court's order to the Supreme Court of the State of New Mexico.

It should be emphasized that the judgment awarded was a judgment for partial attorney's for the bringing of a discovery motion pursuant to Rule 37, New Mexico Rules of Civil Procedure to enforce a discovery order previously entered by the District Court pursuant to Rule 35, New Mexico Rules of Civil Procedure.

The Plaintiff filed a Motion to Dismiss Defendant's appeal (App. 28) asserting that she confessed error on one point and alleging that the matters sought to be reviewed were not ripe for appeal. Plaintiff's contentions

therein are all contained in her Brief in Support beginning at App. 29.

The New Mexico Supreme Court dismissed the appeal and ordered the judgment entered to be amended (App. 36).

Defendant seeks a Writ of Certiorari based on the order of the New Mexico Supreme Court dismissing his appeal.

SUMMARY OF ARGUMENT

This case is not ripe for Petition for Writ of Certiorari pursuant to 28 U. S. C. § 1257 because it is not a final judgment or decree rendered by the highest Court of the State of New Mexico where a federal matter was dispositive.

ARGUMENT AND AUTHORITIES

Petitioner seeks to review a decision of the New Mexico Supreme Court in which all the New Mexico Supreme Court did was correct a defect in an otherwise non-appealable order and dismiss the remainder of the appeal because it was not ripe for appeal. The Supreme Court did *not* make any decision on the merits of the matters which Petitioner attempted to raise in that appeal. See App. 36. The only ground on which Respondent moved the New Mexico Supreme Court to dismiss Petitioner's appeal was

ripeness. Apparently the Court agreed in dismissing the appeal.

28 U. S. C. § 1257 provides a jurisdictional basis upon which this Court can hear matters coming from state courts on Writ of Certiorari. In relevant part § 1257 provides that:

“Final judgments or decrees rendered by the highest Court of the state in which a decision could be had, may be reviewed by the Supreme Court as follows:
. . .

(3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. . . .”

One need read no further into § 1257 than “Final judgments” to see that this Court has no jurisdiction over this case at this time. All of Respondent’s arguments regarding finality made in her Brief in Support of her Motion to Dismiss found at App. 29 are hereby incorporated for sake of brevity. The New Mexico Supreme Court dismissed Petitioner’s appeal, not on the merits, but because it was not ripe for appeal. When this matter has been heard at trial, a judgment rendered and an appeal decided on the merits by the New Mexico Supreme Court, the Petitioner may, depending upon the outcome, seek relief in this Court. He is not properly here now.

The Petitioner previously raised the same jurisdictional arguments he now makes before this Court in Appeal

from the Supreme Court of New Mexico, No. 81-1034, in the Supreme Court of the United States. That case was dismissed on Motion of Respondent.

CONCLUSION

Petitioner does not properly seek a review of a final judgment or decree rendered by the highest Court of the State of New Mexico, the Supreme Court of the State of New Mexico. The Petition for Writ of Certiorari should be denied, and the Respondent should be awarded attorney's fees and her costs incurred herein.

Respectfully submitted,

LAW OFFICES OF LILL & KELLY, P.A.

By: LEO C. KELLY
Attorney for Respondent

620 Two Park Central Tower
300 San Mateo NE
Albuquerque, New Mexico 87108
Telephone: (505) 262-1905